

BRIAN P. FUNK ESQ.
CSB NO. 110462
964 Fifth Avenue #214
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(619) 233-4076

Attorney for Defendant,

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)
Plaintiff,)

vs.)

GILBERTO TORRES-ORDONEZ)
Defendant.)

Crim No. 08CR0171-H

NOTICE OF MOTION TO:
Compel Discovery

DATE : 03-17-08
TIME: 2:00 pm

TO: KAREN HEWITT UNITED STATES ATTORNEY and ,JEFFERY D. MOORE AUSA

PLEASE TAKE NOTICE that on MARCH 17 , 2008, at 2:00 p.m., or as soon thereafter as
counsel may be heard, GILBERTO TORRES-ORDONEZ , by and through his counsel, Brian P.
Funk, will move this Court to compel discovery.

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MOTION

GILBERTO TORRES-ORDONEZ , by and through his counsel and pursuant to the Fifth and Sixth Amendments to the United States Constitution and the provisions of Rule 16 of the Federal Rules of Criminal Procedure hereby brings the following motion:

To compel discovery:

This motion is based on the instant Motions, Notice of Motions, the attached Statement of Facts and Memorandum of Points and Authorities, the files and records in the above-entitled case, and any and all other evidence which may be brought to this Court's attention prior to or at the time of the hearing on these motions.

Dated: March 11, 2008

Respectfully submitted,

/s/ Brian P. Funk
BRIAN P. FUNK
Attorney for Defendant

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POINTS AND AUTHORITIES

Compel Discovery

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**I
MOTION FOR DISCOVERY**

GILBERTO TORRES-ORDONEZ hereby requests discovery **and preservation** of the following items pursuant to the Fifth and Sixth Amendments to the U.S. Constitution, Rule 16 of the Federal Rules of Criminal Procedure, and Brady v. Maryland, 373 U.S. 83 (1963). As of this date GILBERTO TORRES-ORDONEZ has received 158 pages of discovery in the above case,

The items which GILBERTO TORRES-ORDONEZ requests are set forth as follows:

1. All reports by government agents generated as a result of this case including, but not limited

to, crime reports, “tips”, arrest reports, search warrants, and affidavits in support of search warrants. GILBERTO TORRES-ORDONEZ specifically requests all documents and reports concerning this prosecution, including but not limited to all reports generated during this investigation, “A-file” deport tapes prior criminal records , all records of any medical condition of either defendant OR witnesses.

2. A list of all witnesses the government intends to call during its case-in-chief, including telephone numbers of the witnesses and their present whereabouts.

Although a defendant in a criminal case does not have the right to demand a list of witnesses, a federal district court possesses, in the exercise of its inherent power to promote the proper administration of justice, the authority to require the government to disclose a list of witnesses to be called at trial. United States v. Leichtfuss, 331 F.Supp. 723 (N.D. Ill. 1971). In Leichtfuss, the district court ordered the government to provide defense counsel with a list of government witnesses thirty days prior to trial. In the instant case, disclosure of the names and addresses of government witnesses would facilitate prompt and effective cross-examination and foster stipulations to some testimony. Production of the government's witness list would also enable this Court to determine the approximate length of the trial.

3. All statements made by GILBERTO TORRES-ORDONEZ or witnesses.

This item calls for discovery of all statements made by GILBERTO TORRES-ORDONEZ , any Witness. , including the original of the alleged witness statements , all notes and rough notes whether oral, written or recorded, which are in the possession, custody or control of the government or which, by the exercise of due diligence, may become available to the government which have not already been produced by the government. Rule 16(a)(1)(A) clearly authorizes production of such discovery.

This item calls for discovery of all statements of defendant, regardless to whom the statement was made. It also calls for handwritten notes taken by or at the request of government agents

1 concerning such statements. By the very terms of Rule 16(a)(1)(A), the defendant has the absolute
2 right to inspect and copy written or recorded statements made by him to "government agents." The
3 term "government agents" includes employees and agents in the established legal sense of the
4 customs or the INS and all those acting in concert with them. This rule has been interpreted to
5 mandate discovery of the written summary of a defendant's oral statements contained in the
6 handwritten notes of a government agent. Loux v. United States, 389 F.2d 911 (9th Cir. 1968). If
7 the statement of the defendant is summarized in the notes of the U.S. Attorney, it is still discoverable
8 pursuant to Rule 16(a)(1)(A) and is not shielded by the Work Product Rule.

9
10 **4. All books, papers, documents, photographs, tape recordings, video tapes, and**
11 **tangible objects** which are presently in the possession, custody, or control of the government and
12 which are material to the preparation of the defense of defendant or intended for use as evidence by
13 the government in its case-in-chief.

14 Rule 16(a)(1)(C) provides authority for production of documents called for in item # 4. In
15 United States v. Countryside Farms, Inc., 428 F. Supp. 1150 (D. Utah 1977), the court made an
16 interpretation as to what is included in the meaning of Rule 16(a)(1)(C) and concluded "...
17 documents which will be relied on or referred to in any way by any witnesses called by the
18 government during its case-in-chief" are to be produced. Thus all documents and reports which may
19 be relied upon or referred to in any way by any witness are discoverable under Rule 16(a)(1)(C).

20 **5. Government files and records concerning witnesses.**

21 The defense requests disclosure of any and all personnel files for persons to be called as
22 government witnesses, informants in this case, and the defendant, together with the existence of any
23 and all federal, state, and local government files for these individuals. Included in this request is
24 identification of all official or unofficial internal affairs or public integrity investigation files relating
25 to or connected with each witness who was, or is, a law enforcement officer.

26 The defense is entitled to have access to government files in order to ascertain whether there
27 is information within such files which could be of an impeaching nature with regard to each witness
28

1 to be called, including lay witnesses and government agents. United States v. Deutsch, 475 F.2d 55
2 (5th Cir. 1973). In United States v. Morell, 524 F.2d 550 (2nd Cir. 1975), the Second Circuit held
3 that defense counsel were entitled to impeachment information in the confidential file of an
4 informant witness.

5 Personnel files, internal investigation files, state and local government files all should be
6 disclosed to the defense with regard to each witness to be called for the government, including law
7 enforcement agents, all informants, and the defendant. If the government resists production of these
8 documents, then each file should be specifically identified so that the appropriate motions or legal
9 process can be addressed to them prior to the time of trial.

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11 6. **RULE 12 (D)(2)** Notice of all evidence which the government intends to use in its
case-in-chief which may arguably be subject to a pre-trial motion to suppress.

12 The above requested discovery should be promptly disclosed to the defense to avoid delay
13 at the time of trial and to allow an opportunity to evaluate, and possibly conduct further investigation
14 if such statements establish that this is necessary and to allow the defense to adequately prepare for
15 cross-examination of government witnesses. See, Fed. R. Evid. 801(d)(1)(A).

16 Under United States v. Miller, 771 F.2d 1219, 1232 (9th Cir. 1985); United States v. Dupuy,
17 760 F.2d 1492, 1502 (9th Cir. 1985); United States v. Harris, 543 F.2d 1247 (9th Cir. 1976), and
18 Fed. R. Crim. P. 12(I), also moves the court to order the government to produce, in camera if
19 required, any raw notes made by the assistant United States attorney and/or investigative officers of
20 all witness interviews. Should the government be unable to comply because of the destruction of
21 such notes, this could be grounds for sanctions such as dismissal of the indictment or striking of the
22 testimony of any witness to whom such notes relate. United States v. Harris, supra, 543 F.2d at 1251-
23 1252; United States v. Johnson, 521 F.2d 1318 (9th Cir. 1975); United States v. Well, 572 F.2d 1383
24 (9th Cir. 1978).

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27 **7. EXPERT WITNESSES - Fed. R. Crim. P. 16(a)(1)(E)**
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1 8. GILBERTO TORRES-ORDONEZ requests disclosure of the identity of any expert
2 witnesses whom the United States intends to use. Pursuant to Fed. R. Crim. P. 16(a)(1)(E), a written
3 summary of the opinions and the bases therefore, as well as the witness' qualifications, is requested.
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6 The defense also requests that this Court make a continuing discovery order and that the
7 government be compelled to produce materials responsive to items contained in this motion as they
8 become available.
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10 **CONCLUSION**

11 For all the foregoing reasons, counsel for GILBERTO TORRES-ORDONEZ requests that
12 this court grant motion to compel discovery.
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14 Dated: March 11, 2008

15 Respectfully submitted,

17 S/a Brian P. Funk

18 Attorney for Defendant
19 GILBERTO TORRES-ORDONEZ
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Attorney for Defendant,

UNITED STATES DISTRICT COURT
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Plaintiff,)	PROOF OF SERVICE
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vs.)	
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GILBERTO TORRES-ORDONEZ)	
)	DATE : 3-17-08
Defendant.)	TIME: 2:00 pm
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I Brian P. Funk, Electronically served the Notice of Motion and Motion to compel discovery on
US ATTORNEY .
880 FRONT STREET
ROOM 6293
SAN DIEGO CA. 92101

March 11, 2008 s/a Brian P. Funk